

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION,  
Plaintiff,

v.

MOTOROLA, INC., et al.,  
Defendants.

No. C10-1823-JLR

MICROSOFT'S MOTION TO FILE  
DOCUMENT UNDER SEAL

**NOTED FOR:  
Friday, December 2, 2011**

MOTOROLA MOBILITY, INC., et al.,  
Plaintiffs,

v.

MICROSOFT CORPORATION,  
Defendant.

**I. RELIEF REQUESTED**

Microsoft Corporation respectfully requests that it be permitted to file under seal a declaration containing confidential business information of Microsoft and/or non-party Marvell Semiconductor, Inc. ("Marvell").

Concurrently with the filing of this Motion, Microsoft is filing a Motion for Leave to File Supplemental Declaration of Christopher Wion in Support of Motion for Partial Summary Judgment (the "Motion for Leave"). The Motion for Leave requests permission to file the Supplemental Declaration of Christopher Wion ("Supplemental Wion Declaration") attached MICROSOFT'S MOTION TO FILE DOCUMENT UNDER SEAL - 1

1 thereto as Exhibit A. The subject of this Motion is Exhibit 1 to the Supplemental Wion  
 2 Declaration – the Declaration of Jennifer Ochs, Director of IP Litigation at Marvell (the “Ochs  
 3 Declaration”).

4 Microsoft seeks to file the Ochs Declaration under seal pursuant to Local Civil Rule  
 5 5(g) and Paragraphs 2(a) and 8 of the Protective Order Regarding The Disclosure and Use of  
 6 Discovery Materials (ECF No. 72) (the “Protective Order”) entered by the Court on July 21,  
 7 2011. The Ochs Declaration contains references to, and describes, confidential business  
 8 information of Microsoft and/or non-party Marvell Semiconductor, Inc. There is a risk that  
 9 one or more of these parties may suffer harm vis-à-vis their competitors should the information  
 10 in the Ochs Declaration be disclosed publicly. For this reason, Microsoft respectfully requests  
 11 that the Court permit Microsoft to file the Ochs Declaration under seal. With the exception of  
 12 the Ochs Declaration, Microsoft’s Motion for Leave and the Supplemental Wion Declaration  
 13 are being filed as part of the public record.

## 14 II. FACTS AND AUTHORITY

### 15 A. The Ochs Declaration Should Be Sealed under the Terms of the Protective Order 16 and Rule 26(c).

17 The Protective Order provides for Confidential Business Information or other trade  
 18 secret information to be filed under seal. Paragraphs 2(a) and 8 of the Protective Order govern  
 19 the filing of documents under seal. Paragraph 2(a) provides:

20 Any information submitted in pre-trial discovery or in a pleading, motion, or  
 21 response to a motion in this action, either voluntarily or pursuant to order, and  
 22 which is asserted by a supplier to contain or constitute Confidential Business  
 23 Information shall be so designated by such supplier in writing...and shall be  
 24 segregated from other information being submitted. Documents shall be clearly  
 25 and prominently marked on their face with the legend: “[SUPPLIER’S NAME]  
 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO  
 PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of  
 this action, such information, whether submitted in writing or in oral testimony,  
 shall be disclosed only *in camera* before the Court and shall be filed only under

1 seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District  
Court for the Western District of Washington.

2 Paragraph 8 likewise provides that:

3 Any Confidential Business Information submitted to the Court in connection  
4 with a motion or other proceeding within the purview of this action shall be  
submitted under seal pursuant to paragraph 2 above.

5 *Id.*, at ¶ 8.

6 In addition, the Federal Rules of Civil Procedure recognize that courts may permit  
7 parties to file “trade secrets or other confidential research, development, or commercial  
8 information” under seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to  
9 weigh the fairly competing needs and interests of the parties affected by discovery,” in crafting  
10 the appropriate treatment of documents for which protected treatment is requested. *Seattle*  
11 *Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General*  
12 *Motors Corp.*, 307 F.3d 1206, 1211-1212 (9<sup>th</sup> Cir. 2002).

13 While the public generally enjoys a right to inspect and copy public records, “it is  
14 uncontested ... that the right to inspect and copy judicial records is not absolute. Every court  
15 has supervisory power over its own records and files, and access has been denied where court  
16 files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications,*  
17 *Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper  
18 purpose” is where documents filed with the court are used as a “source[] of business  
19 information that might harm a litigant’s competitive standing.” *Id.*

20 The Court should grant leave to file the Ochs Declaration under seal both pursuant to  
21 the Protective Order and Rule 26(c)(1)(G) and (H) because it contains commercially sensitive  
22 business and licensing and business information relating to Microsoft and/or non-party  
23 Marvell. It has been designated “CONFIDENTIAL FINANCIAL INFORMATION –  
24 OUTSIDE ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER,” under the  
25

1 terms of the Protective Order. ECF No. 72, ¶ 6. This type of information may be filed under  
 2 seal pursuant to Paragraphs 1 and 6 of the Protective Order. *Id.*, ¶¶ 1-6.

3 The Ochs Declaration was prepared in connection with a pending ITC action involving  
 4 the parties (*In the Matter of Certain Gaming and Entertainment Consoles, Related Software,*  
 5 *and Components Thereof*, Inv. No. 337-TA-752), and has been treated as Confidential  
 6 Business Information under the Protective Order in that Action. Cramer Dec., ¶ 2.<sup>1</sup> Microsoft  
 7 believes in good faith that non-party Marvell has a reasonable expectation that the information  
 8 contained in the Ochs Declaration will be treated as highly confidential, consistent with its  
 9 prior treatment in the ITC action.

10 The information contained in the Ochs Declaration addresses Motorola's and  
 11 Microsoft's licensing and/or business relationships and communications with non-party  
 12 Marvell. Disclosure of this information could negatively affect one or more of these entities'  
 13 posture in the marketplace vis-à-vis their competitors and lead to competitive harm. Cramer  
 14 Dec., ¶ 4.

15 Microsoft has attempted to limit the amount of sealed information to the minimum  
 16 necessary to protect any commercially sensitive information. Microsoft is filing only the Ochs  
 17 Declaration under seal due to the presence of confidential information in that declaration.  
 18 Because the Ochs Declaration is being submitted as part of Microsoft's Motion for Leave,  
 19 Microsoft is filing a "redacted" version of the Motion for Leave in which the two-page Ochs  
 20 Declaration has been omitted. A complete version of Microsoft's Motion for Leave – which  
 21 includes the Ochs Declaration – is being filed under seal.

22  
 23  
 24  
 25 <sup>1</sup> Declaration of Shane P. Cramer in Support of Microsoft's Motion to File Documents Under Seal ("Cramer Dec.").

### III. CONCLUSION

Microsoft has provisionally filed the Ochs Declaration under seal based on its good faith belief that the document qualifies for protection under the terms of the Protective Order and Rule 26(c). For the foregoing reasons, Microsoft respectfully requests that this Court permit the Ochs Declaration to remain filed under seal. A [Proposed] Order Granting Microsoft's Motion to File Documents Under Seal has been submitted herewith.

DATED this 14<sup>th</sup> day of November, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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